

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

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| UNITED STATES OF AMERICA, | : | |
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| Plaintiff, | : | Case No. 3:21-cr-103 |
| | : | also Case No. 3:22-cv-362 |
| v. | : | Judge Thomas M. Rose |
| DAVON ANDRE WINN, | : | Magistrate Judge Michael R. Merz |
| Defendant. | : | |
| | : | |

**ENTRY AND ORDER OVERRULING DEFENDANT'S MOTION OBJECTING
TO THE REPORT AND RECOMMENDATIONS AND/OR MOTION UNDER
FED. R. CIV. P. 60(b)(1) EXCUSABLE NEGLECT AND/OR MOTION FOR
RECONSIDERATION (DOC. NO. 57), AND PETITIONER'S OBJECTIONS TO
DOC# 60 REPORT & RECOMMENDATIONS ON PETITIONER'S MOTION
FOR RECONSIDERATION (DOC. NO. 63); ADOPTING, IN FULL, THE
REPORT AND RECOMMENDATIONS ON MOTION TO REOPEN (DOC. NO.
56) AND THE REPORT AND RECOMMENDATIONS ON MOTION FOR
RECONSIDERATION (DOC. NO. 60)**

This case is currently before the Court on two entries. First, the Court is presented with Defendant's Motion Objecting to the Report and Recommendations and/or Motion under Fed. R. Civ. P. 60(b)(1) Excusable Neglect and/or Motion for Reconsideration (the "First Objection") (Doc. No. 57) filed by Defendant Davon Andre Winn ("Winn") in response to Magistrate Judge Michael R. Merz's Report and Recommendations on Motion to Reopen (the "First Report") (Doc. No. 56). Second, this case is before the Court on Petitioner's Objections to Doc# 60 Report & Recommendations on Petitioner's Motion for Reconsideration (the "Second Objection") (Doc. No. 63) filed by Winn to Magistrate Judge Merz's Report and Recommendations on Motion for Reconsideration (the "Second Report") (Doc. No. 60). At the heart of Winn's First Objection and Second Objection (collectively "Objections") is Winn's request that the Court revisit his Motion

to Vacate under 28 U.S.C. § 2255 (Doc. No. 42). However, Magistrate Judge Merz correctly characterizes Winn’s arguments as baseless and finds that the Court adequately considered Winn’s Motion to Vacate under 28 U.S.C. § 2255 in its order issued on March 16, 2023 (Doc. No. 49).

In the First Report, Magistrate Judge Merz recommended that Winn’s Motion to Vacate Order Dismissing Movant’s 28USC2255 (Doc. No. 54) –recharacterized as a Motion to Reopen– be denied. (Doc. No. 56.) Winn filed the First Objection (Doc. No. 12) and embedded therein a Motion under Fed. R. Civ. P. 60(b)(1) Excusable Neglect and/or Motion for Reconsideration. (Doc. Nos. 57 and 58.) In turn, Magistrate Judge Merz issued the Second Report recommending that Winn’s Motion for Reconsideration similarly be denied (Doc. No. 60) and Winn filed the Second Objection (Doc. No. 63). In both the First Report and the Second Report (collectively the “Reports”), Magistrate Judge Merz recommended that Winn be denied a certificate of appealability and not be permitted to proceed *in forma pauperis*. (Doc. Nos. 56 and 60.) This matter is now ripe for review and decision.

If a party objects within the allotted time to a United States magistrate judge’s report and recommendation, then the Court “shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b). Upon review, the Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” *Id.* The Court “may also receive further evidence or recommit the matter to the magistrate judge with instructions.” *Id.*

The Court has made a *de novo* review of the record in this case and a “*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1). Upon said review, the Court finds that

Winn's Objections (Doc. Nos. 57 and 63) are not well-taken and they are **OVERRULED**. The Court **ACCEPTS** the findings and recommendations made by the magistrate judge, **ADOPTS** the Reports (Doc. Nos. 56 and 60) in their entirety, and rules as follows:

1. The Report and Recommendations filed on July 24, 2023 (Doc. No. 56) is **ADOPTED** in full;
2. The Report and Recommendations filed on August 24, 2023 (Doc. No. 60) is **ADOPTED** in full;
3. The Court **DENIES WITH PREJUDICE** Defendant's Motion to Vacate Order Dismissing Movant's 28USC2255 (Doc. No. 54), with the caveat that the denial should not be construed as precluding Defendant from filing a habeas petition to the extent appropriate under the circumstances;
4. The Court **DENIES WITH PREJUDICE** Defendant's Motion Under Fed. R. Civ. P. 60(b)(1) Excusable Neglect and/or Motion for Reconsideration (Doc. No. 58) with the caveat that the denial should not be construed as precluding Defendant from filing a habeas petition to the extent appropriate under the circumstances;
5. The Court **CERTIFIES**, pursuant to 28 U.S.C. § 1915(a), that an appeal of this order would not be taken in good faith and therefore Defendant would be denied leave to appeal *in forma pauperis*; and,
6. The Clerk of Court is directed to **TERMINATE** this case on the Court's docket.

DONE and **ORDERED** in Dayton, Ohio, this Tuesday, October 3, 2023.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE